No. 12791 - No. 12792

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WHEELER OSGOOD CO., *Petitioner,* vs. FEDERAL TRADE COMMISSION, *Respondent.*	No. 12791
NORTHWEST DOOR COMPANY, *Petitioner,* vs. FEDERAL TRADE COMMISSION, *Respondent.*	No. 12792

UPON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF OF THE PETITIONERS

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JURISDICTION

This is a petition to review an order of the Federal Trade Commission which ordered the above petitioners to cease and desist from certain practices which ceased August 1, 1941. Jurisdiction rests upon the provisions of Title 15, U.S.C.A., Sec. 45. All of the petitioners conduct their business in the states of Oregon and Washington.

STATEMENT OF THE CASE

The order of the Commission was entered upon an Amended Complaint of the Federal Trade Commission, Answer of respondents to this Amended Complaint and oral argument and briefs by all parties without the introduction of any evidence.

The Amended Complaint was issued on May 19, 1949, and on June 8, 1949, each respondent filed its separate Answer.

In 1933, pursuant to the National Recovery Act, Douglas Fir Plywood Association was formed as a voluntary organization to serve as code authority for the plywood industry. After the Supreme Court held this act an unconstitutional delegation of legislative functions to the President, the Association continued as a trade organization and in 1936, it became a corporation under the laws of the State of Washington.

Petitioner, Northwest Door Company, a Washington corporation, was a member of the Association since prior to 1938 and a subscriber since May 28, 1938. Petitioner, The Wheeler Osgood Co. through its wholly owned subsidiary, Wheeler Osgood Sales Company, became a member of the Association prior to 1938 and a subscriber December 31, 1937.

The Amended Complaint alleged that all of the respondents, except the Association and information bu-

reau, were engaged in interstate commerce and that through the Association and Bureau, all respondents "have engaged in an understanding, agreement, combination, conspiracy and planned common course of action among themselves * * * to restrict, restrain and suppress competition in the sale and distribution of plywood products by agreeing to fix and maintain prices, terms and discounts at which said plywood products are to be sold, and to cooperate with each other in the enforcement and maintenance of said fixed prices, terms and discounts * * *". The Complaint then alleged a series of acts by the respondents followed by a statement of the results of such actions and an allegation that the acts and practices alleged hindered and prevented competition and unreasonably restrained commerce within the meaning of Sec. 5 of the Federal Trade Commission Act.

The answers to this Complaint admitted, "in order to expedite this proceeding and to prevent the business disorganization consequent upon litigation and expense incident to trial," that the above allegations were true but only "for a substantial part of the period of time from May 1935 to August, 1941 and not otherwise."

SPECIFICATIONS OF ERROR

Petitioners assert that the Commission erred in the following particulars:

(a) The respondent, Federal Trade Commission, was in error in entering any order against petitioners

to cease and desist. There was no finding or pleading upon which to base such a finding of any wrongful or illegal action subsequent to August 1, 1941, and due to the long period of time intervening between said date of August 1, 1941, and the filing of the original Complaint herein by the Commission on March 1, 1948, and the entry of said order on October 20, 1950, no cease and desist order of any kind should have been issued.

(b) Many of the acts and transactions set out in the Complaint of the Federal Trade Commission were originally imposed upon petitioners and the rest of the plywood industry, by the United States Government, acting under the National Recovery Act.

(c) The Federal Trade Commission was in error in stating in Paragraph IX of its Findings of Fact that the results of said understandings have been "and now are" to violate the Federal Trade Commission Act in various particulars. Since the Federal Trade Commission had already found in Paragraph Seven that the combination complained of occurred only sometime during the period between May 1, 1935 and August 1, 1941.

ARGUMENT

The third specification of error will be disposed of first as it is merely a correction of an obvious error.

Whatever these Petitioners May Have Done, Such Action ceased on August 1, 1941.

In Paragraph Seven of the Findings, the Commission

specifically found that the combination ceased on August 1, 1941, and the answers of the respondents to the amended complaint likewise limited the end of the acts of which complaint was made. There is, therefore, no support for this finding and the Court should consider that the acts of the defendants ceased on August 1, 1941. (Tr. p. 109)

The Order to Cease And Desist Should Be Set Aside.

The first two specifications of error over-lap and will be argued under the above general heading.

The power of this court is set forth in 15 U.S.C.A. page 45(c) as follows:

> ". . . the Court . . . shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript, a decree, affirming, modifying, or setting aside the order of the Commission. . . . The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

The only unsupported finding has already been considered and therefor, all that need be consulted are the findings of the Commission.

The decisions under the above statute are clear to the effect that the entry of an order to cease and desist is discretionary with the Commission and on appeal this Court decides whether such discretion was exercised wisely.

The fundamental function of the Federal Trade Commission and its power to enter orders was well stated in *Gimbel Bros. vs. Federal Trade Commission,* 2 Cir., 116 F. 2d, 578 at page 579.

> "The purpose of the statute is protection of the public, not punishment of a wrongdoer."

Where, as here, the actions ordered to cease and desist had already ceased seven years before the original complaint was issued and nine years before the order, the natural inquiry is, "How can this order have afforded the public any protection?" The answer to this in the instant case is not easy and naturally leads to further consideration of the decisions.

In *Eugene Dietzgen Co. vs. Federal Trade Commission,* 7 Cir. 142 F. 2d 321, at pages 330-331, the Court said:

> "The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent toward the proceedings, the sincerity of its practices and professions, of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.
>
> "On the other hand ,parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion

to be exercised wisely by the Commission—when it comes to entering its order.

> "The object of the proceeding is to stop the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case."

With the above statement of law in mind certain facts are significant.

The Commission has found that Douglas Fir Plywood Association originated as the Code Authority for the plywood industry (Tr. p. 98). In *Schechter vs. United States,* 295 U.S. 495, 79 L.ed. 1570, the National Industrial Recovery Act (Act of June 16, 1933, Chap. 90, 48 Stat. at L. 195, 196, U.S.C. Title 15, Sec. 703) was held unconstitutional as an undue delegation of legislative power to the executive. In that case, it appears that actions taken under the Act were similar to the acts complained of herein by the Federal Trade Commission. In that case, there was no condemnation of such acts—the court simply held that the defendants therein, who didn't want to be bound by the poultry code, could not be forced to comply with the provisions of the code. The Commission then found that after the *Schecter* case, the association continued as a trade association (Tr. p. 98). It appears, therefore, that the order herein complained of was based upon actions

which originated in an Act of Congress passed in 1933 and which actions ceased 1941. The Order, therefore, condemns these petitioners for acts originating in an Act of the Congress.

Having in mind that the function of an order of the Commission is protection of the public in the future the origin of the condemned actions in this case and their cessation in 1941 are pursuasive, to say the least, that the actions have ceased forever.

While these respondents do not contend that the combination which their answers admitted was legal they do wish that the Court consider their origin as being actions under an act of Congress and, in passing, a doctrine of the criminal law seems pertinent. The case of *Sorrells vs. United States* 287 U. S. 435, 77 Lawyer's Edition, 413, involved a prosecution under the Prohibition Act and the opinion considered the defense of entrapment. At page 459, Mr. Justice Roberts said, "The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy". Applying the words of that quotation to the instant case, the Acts of which complaint is made originated in an Act of Congress instead of acts of government officials. These acts continued for a period of approximately six years without any condemnation by any other department of the govern-

ment, and then eight years after they have ceased, the Federal Trade Commission bring a Complaint for these Acts.

Not only the origin of their combination but its termination also leads to the conclusion that there will be no rebirth and no order to cease and desist was or is necessary.

In paragraph seven of the Findings (T. p. 109, 110) the Commission found that the combination existed "during a substantial part of the period of time between May, 1935, and August 1, 1941. . . ." There is no finding with respect to the circumstances surrounding the demise of the combination but the Court can, of course, take notice of the fact that World War II occurred with its price controls but such controls ceased in 1945 leaving a period of three years before the original complaint was filed. During this period these respondents and all the other respondents might well have resumed the combination had they so desired but no evidence whatever was produced with respect to such action.

These respondents wish to call to the attention of the Court to the following authorities:

John C. Winston Co. vs. Federal Trade Commission, 3 Cir. 3, Fed. (2d) 961;

Federal Trade Commission vs. Civil Service Training Bureau, 6 Cir. 79 Fed (2d) 113, at 116;

Galter vs. Federal Trade Commission, 7th 186, Fed. (2d) 810, at 812.

In order to avoid further repetition, these respondents wish to call the attention of the Court to the brief filed on behalf of Douglas Fir Plywood Association by Alfred J. Schweppe of the firm of McMicken, Rupp & Schweppe.

In closing these respondents contend that there is no public interest in the entry of the order of the Commission. The origin of the combination and its end clearly show that it has ceased forever, and these respondents, therefore, respectively submit that the order be set aside.

Respectfully submitted,

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